THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Maite Murphy, Circuit Court Judge

Appellate Case No: 2017-001595

Willie Bell, Jr., #254817, Petitioner,

vs.

State of South Carolina Respondent.

APPENDIX
VOLUME III OF III

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)

Willie Bell, Jr., #254817,) CASE NO.
☒ Plaintiff) 2009-CP-38-1261

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
State Of South Carolina)
☐ Defendant.)

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☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCP, Motin
Estimated Time Needed: 1/2 hour Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — September 21, 2015 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA) COUNTY OF ORANGEBURG)	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Willie Bell, Jr. #254817,) Applicant,) v.)) State of South Carolina,) Respondent.)	2009-CP-38-1261 **MOTION PURSUANT TO RULE 59(A) AND (E), SCRCP**

This matter comes before the Court pursuant to an Application for Post Conviction Relief filed on July 29, 2009. The State filed a Return on or about February 1, 2010. On October 14, 2014, Applicant, through counsel, filed an Amendment to Application for Post Conviction Relief, which amended the Application by adding the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare with Applicant for trial. See Applicant's Pre-trial Motion to Relieve. Tr. p. 11.

2. Ineffective assistance of trial counsel for failure to utilize Jannie Simmons and Ann Wallen (trial witnesses) as witnesses at the Jackson v. Denno hearing.

3. Ineffective assistance of trial counsel for failure to utilize Applicant as a witness at trial.

4. Ineffective assistance of trial counsel for failure to call witnesses on Applicant's behalf.

5. Ineffective assistance of trial counsel for failure to consult with and utilize a forensic pathologist.

6. Ineffective assistance of trial counsel for failure to raise inconsistencies in the purported original pathology report to the court pre-trial and during trial. Alternatively, prosecutorial misconduct and/or Brady violation if the original pathology report, not listing a 2cm defect under the description of the lungs (contained in the Coroner's File), was not turned over to the defense.

7. Ineffective assistance of trial counsel for failure to object to the State's repeated questions and comments regarding "stabbing"; failure to refute the alleged evidence regarding a "stabbing."

8. Ineffective assistance of trial counsel for failure to effectively cross-examine the State's witnesses on and argue to the jury about the inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants.

9. Ineffective assistance of trial counsel for failure to make a pre-trial motion to exclude the testimony of Victoria Baskins. Ineffective assistance of trial counsel for failure to object to the State's comments regarding Victoria Baskins in closing argument. Tr. p. 580, lns. 19-22.

10. Ineffective assistance of trial counsel for failure to cross-examine Frank Colter.

11. Ineffective assistance of trial counsel for failure to raise a third party guilt defense.

12. Ineffective assistance of trial counsel for failure to effectively cross-examine the State's witnesses regarding the DNA findings.

13. Ineffective assistance of trial counsel for failure to effectively cross-examine Kareem Taylor.

14. Ineffective assistance of trial counsel for failure to effectively utilize the witnesses called by the defense.

15. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal, specifically but not limited to:
    a. Applicant's Motion to Relieve Counsel. Tr. p. 11.
    b. Jackson v. Denno hearing. Tr. p. 37
    c. Defense counsel's objections to pictures. Tr. p. 100, 195, 240, 247.
    d. Defense counsel's motion for a mistrial. Tr. p. 294.
    e. Defense counsel's objection to the Coroner's "expert" testimony. Tr. p. 247.

16. **Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.** (emphasis added)

On May 19, 2015, an evidentiary hearing was conducted at the Dorchester County Courthouse in front of the Honorable Maité D. Murphy. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Clayton Mitchell, Assistant Attorney General. Applicant testified along with Jannie Simmons, Ann Wallen, Sean Fogle, Deputy Coroner for Orangeburg County, Dr. John David Wren, Margaret ("Peggy") Hinds, Esquire, and Doug Mellard, Esquire. This Court had before her a copy of Applicant's admitted

exhibits, the records of the Orangeburg County Clerk of Court, the trial transcript, the appellate court filings, and Applicant's records from the South Carolina Department of Corrections. At the close of the hearing, in lieu of argument, proposed Orders were requested from both parties. Both parties complied, and an Order of Dismissal was issued on August 31, 2015. On September 16, 2015, Applicant, through counsel, was served via mail with an unfiled copy of the Order of Dismissal from which this Motion follows.

Rule 59, SCRCP, in pertinent part provides:

> **(a)** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

Pursuant to Rule 59, SCRCP, Applicant would urge this Court to at a minimum alter or amend her judgment to ensure that all issues raised, testimony offered and exhibits entered at the evidentiary are properly addressed. See Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) (Holding that a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.); See also S.C. Code Ann. § 17-27-80. Additionally, Applicant would ask for the opportunity to be reheard on a number of issues addressed in the Applicant's proposed Order and/or addressed below.

In light of Applicant's request for this Court to reopen her judgment, hold a hearing if necessary and make amended and/or new findings of facts and conclusions of law, Applicant would ask this Court to obtain the transcript from the evidentiary hearing to ensure that the

standing Order is accurate and reconsider the testimony and evidence submitted as a whole. Specifically, Applicant would ask this Court to consider the following:

1. The standing Order does not properly reflect the testimony offered by Dr. John David Wren, Margaret ("Peggy") Hinds, Esquire and Doug Mellard, Esquire. The standing Order also notably fails to address any testimony offered that was favorable to Applicant.
2. The standing Order devotes a lengthy portion to a finding of overwhelming evidence of guilt, which Applicant submits amounts to an error of law. In making this finding and applying it in an overreaching fashion, a proper prejudice analysis is not conducted on a number of allegations. Additionally, the short jury deliberation is cited to as a basis for this finding, which Applicant submits supports a finding of obvious prejudice. Simply put, the jury's short deliberation is indicative of the ineffectiveness rendered by counsel.
3. Under the section addressing counsel's failure to utilize Applicant as a witness, the Order fails to address Applicant's testimony about the following matters that he would have wanted to testify about at trial:
    a. The set-up of his trailer and the victim's home and how he primarily lived in the victim's home.
    b. His unrefuted affection for his mother and their special relationship.
    c. His timeline and the events in question / his version of the events.
    d. As it relates to the DNA evidence, how his mother had pricked her finger prior to her death and how he did not own the shoes in question until after her death.
    e. As he testified to at the Jackson v. Denno hearing, how he did not make the statement that he stabbed his mama and how he found out that she was allegedly stabbed from law enforcement. Transcript p. 69.

f. How no one used the front door, so it would have had to be a stranger that left an accelerant trail out the front door. Transcript p. 443.

g. In response to trial testimony about the wood splitter being in the victim's bedroom and such being a source of the blunt force trauma, an explanation that the victim would bring in such items prior to going out of town. Transcript pp. 218, ln. 18, 612.

h. To the facts involving the incident with Victoria Baskins and that was not charged for the alleged incident with her at the detention center.

4. Despite filing an Amendment alleging a Brady violation and/or prosecutorial misconduct in October of 2014, Applicant and Applicant's counsel heard for the first time in the middle of the evidentiary hearing that the pathology report contained in the Coroner's file (Applicant's Exhibit 2) was not in the file maintained by the Solicitor's Office, as was addressed in Applicant's proposed Order. Applicant submits that this Court's findings regarding this report and the failure to utilize a forensic expert are incomplete and in error.

As a threshold matter, Applicant would request that this Court reconsider the argument set forth in Applicant's proposed Order, which is attached hereto as Attachment A. Secondly, Applicant submits that this Court's finding that the report was merely cumulative lacks support as it was clear from the evidentiary hearing and from the record that the report failed to list the alleged stab wound and demonstrated that the inclusion of the stab wound was added at a later time without re-examination of the body. Thirdly, this Court has found that counsel effectively called into question the procedure used and findings made by Dr. Ross, but Applicant submits that without Applicant's Exhibit 2 exonerating and impeaching evidence was not brought to light, which could have also provided a basis for the suppression of the testimony

of Dr. Ross (for failure to disclose the report) and the exclusion of the highly damaging testimony and evidence offered regarding the alleged stab wound.

Alternatively to the argument set forth in Applicant's proposed Order and in line with Applicant's filed Amendment, Applicant would also ask this Court to consider that it is a matter of prosecutorial misconduct and/or a Brady violation to not obtain and reveal all reports in existence that were generated by a testifying expert. See State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). As was indicated in Applicant's counsel's communication with the Court, the Order was proposed based upon counsel's obvious ineffective assistance, which is supported by Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978), but there does exist an alternative argument of prosecutorial misconduct and/or a Brady violation, which Applicant would ask this Court to consider. In so much that the Order appears to excuse the absence of the inclusion of the report in the testimony of Dr. Ross or the trial as a whole on the basis that the report was merely "temporary," it must be noted that the State failed to call Dr. Ross at the evidentiary hearing and any findings related to her reasons for failing to disclose the report and the weight to be given to the report are speculative at best.

5. The standing Order finds that Applicant failed to present any testimony or evidence on the following claim: Ineffective assistance of counsel for failure to effectively cross-examine the State's witnesses on, and argue to the jury about the inconsistencies in the reports regarding the fire scene and matters regarding the testing for accelerants. Applicant submits that this is in error and asks this Court to consider the following sections taken from Applicant's proposed Order, which address how this issues was raised at the evidentiary hearing.

> As it related to his allegation that counsel failed to bring out the inconsistencies in the testimony about the fire scene, Applicant's counsel summarized topical areas of the testimony offered by the State's witnesses, and Applicant responded that counsel essentially failed to capitalize on the inconsistencies in the testimony offered.[1]
> Through the testimony of Applicant and defense counsel, the question was raised why counsel never addressed the failure of the investigating agencies to test the car and clothing for accelerants. Upon review trial transcript, this Court sees no mention of such testing being done. As was pointed out by Applicant, the State argued that he threw the clothes away because there was evidence on them, but defense counsel never questioned the absence of any findings of accelerants, which were used to start the fire per the investigation, on the clothing items. Transcript p. 617, lns. 11-15.

Therefore, based upon the foregoing, Applicant would respectfully request that this Court obtain and review a copy of the evidentiary hearing transcript, schedule a hearing on the instant motion and reopen her standing Order. At a minimum, Applicant would request that this Court amend her standing Order to ensure that all issues are

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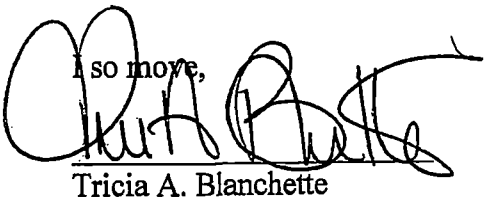
[1] Specifically, counsel gave the following topical transcript summations while Applicant was on the stand:

a. Testimony regarding the body:
   1) Per Shuler, the body on left side, sort of face down, with no debris on the body. Transcript pp. 196-7.
   2) Per Coroner, the body was face down, with more damage than the pictures showed. Transcript pp. 235, 237. The pictures of the body depict blunt force trauma. Transcript pp. 249-50. No debris was found on the body. Transcript p. 256
   3) Per Dr. Ross, the skull was charred and fractured. Transcript p. 477.
b. Testimony regarding the fire location and condition of the house:
   1) Per Shuler, the fire started on the right side of the house and the roof was burnt off. Transcript pp. 191, 201.
   2) Per Agent Weir, the fire started in the victim's bed. Transcript p. 421.
   3) Per Agent Collier, the fire started by the victim and no debris was on her. Transcript p. 437. The roof and walls were in tact. Transcript p. 439.
c. Testimony regarding the items found in the victim's bedroom:
   1) Per Shuler, a gas heater was removed from the bedroom; there was no lamp. Transcript p. 200. Money and keys were removed from the bedroom. Transcript p. 200.
   2) Per Agent Collier, the canine alerted to an oil lamp. Transcript p. 441. The cause of the fire was an oil lamp. Transcript p. 443.
   3) Per Dingle, the wood splitter from by the victim's bed was kept outside. Transcript p. 218, ln. 18. The victim had kerosene lamps for emergency. Transcript p. 221.
d. Factual argument contained in State's closing argument:
   1) Applicant turned the victim face down and poured accelerants all over the bed, door and floor. Transcript p. 602. The trauma to the victim's head was caused by the wood splitter. Transcript p. 612. There was evidence of a broken oil lamp, accelerants and heavy petroleum. Transcript p. 614.

properly addressed and preserved for appellate review. Ultimately, Applicant would ask that this Court rescind her standing Order and enter an Order granting his Application for Post Conviction Relief.

I so move,



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September 21, 2015
Columbia, SC

ATTACHMENT A

A. Ineffective assistance of counsel for failure to consult with and utilize a forensic pathologist; Ineffective assistance of counsel for failure to raise inconsistencies in the purported original pathology report to the court pre-trial and during trial. Alternatively, prosecutorial misconduct and/or Brady violation if the original pathology report, not listing a 2cm defect under the description of the lungs (contained in the Coroner's File) was not turned over to the defense.

At the conclusion of Applicant's motion to relieve counsel, Attorney Mellard informed the Court that to his knowledge the State had provided full discovery. Transcript p. 32, lines 13-18. During opening argument, Attorney Mellard argued to the jury about the initial autopsy report (Applicant's Exhibit 7) that listed the cause of death as "pending investigation" and the amended autopsy report (Applicant's Exhibit 8) that listed the cause of death as "homicide." Transcript pp. 170-71. During the State's opening, the following argument was made, which summarizes the State's theory of the cause of death:

> Now, this is just some, some of the evidence that you're going to hear about in this case. Because you're also going to hear, for example, about how after they arrested the Defendant on that Thursday, March Sixteenth, they read him his rights, after the Defendant was read his rights one of the first statements he makes is, I didn't stab my Mama, is how he referred to his grandmother, that he didn't stab his grandmother. Now, this is significant, ladies and gentleman, because the police, on Thursday, March Sixteenth, as you'll hear, they didn't know anything about a stabbing. All they know is that they had a burned body. They didn't know anything about a stabbing. It was so significant that one of the officers in the room called the pathologist right after that statement, moments after that statement, and you'll hear, the pathologist will testify to this, that even though Ms. Bell's body was so badly burned that she can't tell where she may have been stabbed on most of her body, that there is one place in her back, one place in her back where Ms. Bell has a stab wound.

Transcript p. 164, lns. 4-24.

When Dr. Janice Ross took the stand, she was qualified by the State as an expert in forensic pathology, without objection. Transcript p. 473. She acknowledged that she conducted the autopsy of the victim, provided general testimony about conducting an autopsy and stated –

"we take pictures." Transcript p. 473, lns. 8-25. She illustrated how badly the body was burned by showing a picture that was marked as State Exhibit 7-D.[1] Transcript p. 474, lns. 3-14. When asked if any stab wounds were located, Dr. Ross explained that a stab wound was found "in the back wall of the left chest" with bruising, which indicated that the victim was alive at the time she was stabbed. Transcript p. 475, lns. 5-25. She recounted that she first informed law enforcement about the stab wound on March 16th after law enforcement had talked to Applicant and they had "a suspicion that the victim had been stabbed." Transcript p. 476, ln. 12 – 477, ln. 1. She concluded that the cause of death was homicide due to factors, which included the stab wound. Transcript pp. 478-9. On cross-examination, Attorney Mellard questioned Dr. Ross about the evolution of the findings in her two reports. Transcript pp. 482-4.

When Agent Collier was on the stand, during the Jackson v. Denno hearing, he testified as follows:

> Q: Okay. Could you tell the Court what the extent of that verbal statement was on the Sixteenth of March?
>
> A: We were asking him about the case involving his grandmother, and Mr. Bell was asked if he was responsible for the death of his grandmother, and he said, he made the statement that he did not stab his grandma, at which time I was kind of taken aback because at that point we had not heard, or were aware of any stab wounds to the victim. I went outside and called the pathologist on the telephone and she advised that it was, indeed a stab wound to the victim. Shortly after that the Defendant invoked his right to an attorney.

Transcript p. 44, ln. 14 – 45, ln. 3. Interestingly, when Investigator Rodriguez was asked about the meeting during which Applicant made the verbal statement allegedly stated that he would

[1] At the evidentiary hearing, Applicant's counsel introduced an Affidavit from the Orangeburg County Clerk of Court's office affirming that State's Exhibit 7 could not be located. Applicant's Exhibit 1. While Dr. Wren was on the stand, Applicant's counsel introduced pictures provided to Dr. Wren that were contained in the defense file that represented the condition of the victim's body. Applicant's Exhibits 4, 5, & 6.

never stab his grandmother, Investigator Rodriguez testified that only he and Sergeant Bonnet were in the meeting. Transcript pp. 62-3.

Throughout trial, the State made repeated references to a "stabbing." Additionally, the State elicited testimony from Agent Collier about Applicant's alleged statements and his discussion with Dr. Ross about the stab wound. Transcript pp. 474-9. In closing, the State made it clear that their theory was Applicant stabbed the victim. Transcript pp. 612, 618, 621.

Following the filing of the instant Application, Applicant, through counsel, obtained an expert in forensic pathology. As a result, Applicant through counsel, filed a discovery motion requesting a complete copy of the Coroner's file. In response to the motion, an Order was entered and the file was obtained by Applicant's counsel. In compliance with the Order and resulting subpoena, Sean Fogle, Deputy Coroner, for Orangeburg County explained that he turned over the Coroner's file to Applicant's counsel, which contained the pathology report marked as Applicant's Exhibit 2. While on the stand, Fogle explained that any party (solicitor or defense) could request a copy of the Coroner's file.

When Attorney Hinds and Mellard took the stand, they were both adamant that they had never seen the report marked as Applicant's Exhibit 2 until it was shown to them during a meeting with Applicant's counsel prior to the evidentiary hearing.[2] Essentially, they both testified that they were not aware that a pathology report existed that did not report a defect in the left chest wall. Attorney Mellard recalled speaking with Dr. Ross prior trial, and she did not mention the report marked as Applicant's Exhibit 2. Both counsel acknowledged that the report would have aided in the defense, especially in the cross-examination of Dr. Ross. It was also acknowledged that counsel could have obtained a copy of the Coroner's file prior to trial. Neither

[2] This Court finds the testimony of both attorneys that served as trial counsel to be credible.

counsel provided a reason for failing to utilize an expert in pathology and conceded that Dr. Wren's testimony would have assisted in Applicant's defense.

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair, not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the prosecution failed to disclose that a witness, whose credibility was already in question, was taken to the scene and gave an additional version of events. After Gibson pled guilty, this information was discovered during the course of a civil trial. The South Carolina Supreme Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

> The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of

> prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Id. at 528-9, 514 S.E.2d at 327.

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of, or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-69, 131 L. Ed. 2d 490, 505-10 (1995); Brady, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L. Ed. 2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

At first blush, this Court acknowledges that this matter appears to implicate a Brady violation and/or prosecutorial misconduct since the report in question was not provided to the defense and the State's expert did not disclose it prior to or during trial. At the evidentiary hearing, Respondent did not call Dr. Ross or Solicitor Pascoe, so Applicant's allegations were not refuted by testimony offered by Respondent. Even though Solicitor Pascoe was not called to the stand, counsel entered into a stipulation, that during a break in the proceedings, counsel had been informed by Solicitor Pascoe that the pathology report marked as Applicant's Exhibit 2 was not contained in the Solicitor's file.[3] As a result this Court cannot find that the failure to disclose

[3] Applicant filed his Amendment alleging a Brady violation and/or prosecutorial conduct in October 2014, Respondent did not file a responsive pleading and/or put Applicant on notice of the Solicitor's Office position / response prior to the evidentiary hearing.

the report amounts to a Brady violation and/or that the concealment of the report by the State's expert can be impugned upon the Solicitor as prosecutorial misconduct. Obviously, it was not known to Applicant or his counsel prior to the evidentiary hearing that the report was not in the Solicitor's file as it clear that Applicant was proceeding on the alternate theories of ineffective assistance of counsel and/or a Brady violation relating to the pathology report marked as Applicant's Exhibit 2.[4] Based upon the evidence and testimony presented at the evidentiary hearing, this Court finds that the failure to discover and utilize the pathology report marked as Applicant's Exhibit 2 should be addressed as a matter of ineffective assistance of counsel, in conjunction with counsel's failure to utilize an expert pathologist.

This Court's finding is guiding by the reasoning set forth by the South Carolina Supreme Court in Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978). In Anderson, the Supreme Court reversed the lower court's granting of post conviction relief on the basis of a Brady violation resulting from the prosecutor's failure to turn over an autopsy report. The State argued that the report was on file in the coroner's office and could have been obtained by the defense. Id. at 439, 249 S.E.2d at 122. The court reasoned: "It is implicit that the Brady rule applies only to favorable evidence which the prosecution has but which is unavailable to the defendant." Id. at 438, 249 S.E.2d at 122. Simply put, the Supreme Court concluded that "Brady does not shift to the State the burden of gathering evidence for the defense." Id. at 439, 249 S.E.2d at 122.

Here, the report in question was obtained by Applicant's counsel in preparation for the evidentiary hearing and as a resource for Applicant's expert pathologist. The Deputy Coroner

[4] It must be noted that Applicant made alternate allegations of ineffective assistance of counsel and a Brady violation in his filed Amendment, and included the following, as well: "Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing." Therefore, based upon the evidence and testimony presented at the evidentiary hearing, this Court finds that the failure to discover and utilize the pathology report marked as Applicant's Exhibit 2 should be addressed as a matter of ineffective assistance of counsel, in conjunction with counsel's failure to utilize an expert pathologist.

clearly testified that any party could submit a request for the Coroner's file that contained the report. Additionally, defense counsel did not provide a reason for failing to request the Coroner's file and/or retain a pathology expert. This Court finds such failure to be inexcusable when the report counsel failed to obtain and utilize in Applicant's defense undermined the State's theory of the case, aided in Applicant's defense and called into question the credibility of the State's expert witness. Obviously, Applicant was prejudiced by counsel's failure.

Not only did counsel fail to obtain the report at issue but counsel also failed to consult or utilize a pathology expert even though counsel testified that the primary defense was the State's inability to prove when, why and how the victim died.

At the evidentiary hearing, John David Wren, MD, Ph.D, was offered as an expert in anatomical, forensic and clinical pathology, and was found to be qualified, without objection from Respondent. Dr. Wren explained that he reviewed the entire SLED file, photos provided by the Public Defender, Coroner's file, and the trial transcript. Dr. Wren provided lengthy testimony regarding his findings and opinions, which this Court finds integral to a case where the primary defense was derived from the pathology findings. This Court is convinced that the trial would have had a different outcome if Dr. Wren's testimony would have been presented by the defense.

First, Dr. Wren addressed Applicant's Exhibit 2. Based upon his experience, Dr. Wren explained that Applicant's Exhibit 2 may have been issued as a temporary report that was sent to the Coroner's Office, but he concluded that the lack of reference to a defect in the left posterior pleura but subsequently appearing in another report (Applicant's Exhibit 7), which was relied upon at trial, was a glaring problem since much of the accusations depended upon that observation. Dr. Wren explained that it is a common practice that if a change is made to a report then a note of reference as to why the report has been changed is made within the report. Here,

that practice was not followed nor was it disclosed by the State's pathologist that the first report (Applicant's Exhibit 2) even existed.[5] When asked by Respondent about Applicant's Exhibit 2 merely being a draft that mistakenly appeared in the Coroner's file, Dr. Wren responded that Applicant's Exhibit 2 appeared to be a signed formal report and he could not contemplate why/how a draft would be sent to a Coroner.

Beyond his clear concern over the report that was not addressed at trial, Dr.Wren also took issue with the two reports that were addressed. Dr. Wren noted that Dr. Ross did not refer to any pictures of the wound in question nor had he seen any that confirmed the wounds existence. He explained that if the wound was present prior to death (as was alleged by the State and found by Dr. Ross) then there should have been some blood within the pleural cavity, but none was mentioned in the report. Furthermore, the pleural defect was listed without re-examining the body and without photographic evidence to review.

In all three reports, Dr. Wren found that there was no mention of the fact that there is a possible burn artifact and skull fracture of the back of the head that can be seen in several photos at the scene and referred to in the investigator's notes from the scene. He also explained that he had serious questions about the lack of findings regarding the health of the victim. He concluded that she would have to have been one of the healthiest individuals at her age that he had witnessed in his decades of experience. He further explained that there was no mention of edema fluid in the respiratory tree which indicates that there was a possible cardiorespiratory event associated with the death. He concluded, in his expert opinion, that even if there was a stab wound, which he found to be unsubstantiated, the victim did not die from a stab wound.

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[5] Dr. Wren also noted defense counsel's line of cross-examination about amending the reports (Applicant's Exhibit 7 & 8) without re-examining the body, and he opined that he could have testified that this too was not normal procedure.

As has already been addressed, the utilization of an expert by the defense in the capacity of Dr. Wren would have triggered the discovery of the report (Applicant's Exhibit 2) that was not utilized by the defense. Moreover, Dr. Wren called into question the State's theory of the case and offered an alternative theory of death that was not explored at trial.[6] Dr. Wren also questioned the procedures utilized and the absence of findings regarding the victim's health. After hearing Dr. Wren's testimony, which is only briefly summarized here, this Court is firmly convinced that trial counsel rendered ineffective assistance when they failed to obtain and utilize a forensic pathologist, who like Dr. Wren could have aided Applicant's defense that the State failed to establish when, why and how the victim died and refuted the testimony of the State's expert.

Similarly, in McIver v. United States, Mem. Op. and Order, Crim. No. 8:04-0745-HFF (D. SC. May 28, 2010), Judge Floyd found that counsel was ineffective when he failed to investigate more fully the cause of death established by and testified to by Dr. Ross and toxicology evidence addressed by Dr. Garvin at trial.[7] The Court further held that the affidavits submitted by McIver's experts in the area of pathology and toxicology established prejudice from counsel's failure to investigate and/or refute the findings and testimony of Dr. Ross.

As is detailed above, this Court finds that Applicant has clearly shown that trial counsel was ineffective for failing to investigate the cause of death and/or pathology procedures and findings by utilizing an expert pathologist and obtaining the Coroner's file that contained Applicant's Exhibit 2. This Court finds such failure to be inexcusable when the report counsel failed to obtain and utilize in Applicant's defense, along with Dr. Wren's testimony, undermined

[6] In closing, the Solicitor argued that the victim was stabbed. Transcript pp. 612, 618.

[7] A copy of the Memorandum Order and Opinion was reviewed by Dr. Wren and provided by Applicant's counsel to Respondent, trial counsel and offered to this Court.

the State's theory of the case and called into question the credibility of the State's expert witness. In a circumstantial case, where the State informed the jury that Applicant admitted that he stabbed his grandmother, which resulted in the confirmation by the pathologist of a stab wound, an undisclosed report failing to list the alleged stab wound and the testimony of Dr. Wren would have clearly impacted the outcome of the trial. Upon a full review of the record, this Court finds obvious prejudice resulting from the ineffective assistance rendered.

STATE OF SOUTH CAROLINA) COUNTY OF ORANGEBURG)) Willie Bell, Jr., #254817,) Applicant,) v.)) State of South Carolina,) Respondent.)	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT 2009-CP-38-1261 CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 21st day of September 2015, a copy of Motion Pursuant to Rule 59, SCRCP, to Clay Mitchell of the Attorney General's Office, at:

Office of the Attorney General
Att: Clay Mitchell, Ast. AG
P.O. Box 11549
Columbia, SC 29211-1549

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Applicant

September 21, 2015

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Willie Bell, Jr., #254817, Applicant, v. State of South Carolina, Respondent.	2009-CP-38-1261 **RETURN TO APPLICANT'S MOTION PURSUANT TO RULE 59(A) AND (E), SCRCP**

This matter comes before the Court by way of Applicant's "Motion Pursuant to Rule 59(a) and (e), SCRCP."[1] Respondent, making its Return to the motion, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Orangeburg County Grand Jury for Murder (2006-GS-38-0751). He was represented by Peggy Hinds, Esquire, and Doug Mellard, Esquire. Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr. Applicant was found guilty, and on March 15, 2007, Applicant was sentenced to fifty (50) years' imprisonment.

A notice of appeal was filed and an appeal perfected by Robert M. Dudek, then Deputy Chief Appellate Defender for Capital Appeals of the South Carolina Commission on Indigent Defense of the Division of Appellate Defense. Applicant's conviction and sentence were affirmed. State v. Bell, Op. No. 2009-UP-325 (S.C. Ct. App. filed June 15, 2009). The remittitur was sent on July 1, 2009.

[1] This motion to alter and amend the judgment was not filed with the Orangeburg County Clerk of Court.

II.

Applicant filed an application for post-conviction relief on April 15, 2013 and amended on July 29, 2009. A full evidentiary hearing into the matter was convened May 20, 2015, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell of the South Carolina Attorney General's Office. By written Order signed August 31, 2015, and filed September 15, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice.

III.

Respondent submits Applicant's motion must be denied because it was not made in a timely manner. Rule 59(e) of the South Carolina Rules of Civil Procedure provides that "[a] motion to alter to amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." The motion must then be filed with the court within five (5) days. See Rule 5(d) ("All papers required to be served upon a party . . . shall be filed with the court within five (5) days after service thereof.").[2] Respondent submits Applicant's motion should be denied because it was never filed.

IV.

If the Court considers the motion on the merits, Respondent submits this Court properly ruled on all issues presented at the post-conviction relief hearing and Applicant's motion should be denied. In his motion, Applicant asserts that several of his allegations are not addressed sufficiently and asks this Court to reconsider its ruling. Respondent submits that this Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by

[2] Rule 5, SCRCP, also states: "Upon failure of a party to file other pleadings, motions, or papers, the court may permit filing or proceed as through the same had not been served."

S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits that the motion was not filed in a timely manner.

V.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 24, 2016

STATE OF SOUTH CAROLINA COUNT OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
	2009-CP-38-01261
WILLIE BELL JR., #254817, Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return to Applicant's Motion Purusant to Rule 59(a) and (e), SCRCP** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

WILLIE BELL JR., #254817
LIEBER CORRECTIONAL INSTITUTION
PO BOX 205
RIDGEVILLE, SC 29472

DATED this 24th day of March, 2016.

Jenna C. Brown, Legal Assistant
For Respondent

LAW OFFICE OF TRICIA A. BLANCHETTE

April 4, 2016

Honorable Maité Murphy
Judge, 1st Judicial Circuit
5200 E. Jim Bilton Blvd.
St. George, SC 29477

RE: Willie Bell, Jr., v. State; Docket No.: 2009-CP-38-1261

Dear Judge Murphy:

As was addressed last week via email, I did not receive a copy of the State's response to the Rule 59, SCRCP, Motion or proposed Order. As the letter and Certificate of Service reflect, it was sent solely to my client. After receiving a call from my panicked client's family last week, I contacted the Attorney General's Office and was emailed the documents. Upon review, I discovered that the AG was arguing that the Rule 59, SCRCP, Motion was not timely filed. Several weeks prior, I had approached your Honor with a copy of the Motion, and Clay Mitchell did not indicate at that time his position that the Motion was untimely. If he had mentioned it at that point or contacted me prior to submitting his extremely delayed response, I would have provided the clocked in copy I provided last week and contacted the Orangeburg Clerk of Court as I did last week. As I addressed via email, the Orangeburg Clerk of Court has now corrected their records to properly reflect the filing of the Motion on September 23, 2015.

As a result, I ask that this Court find the State's Response and proposed Order to be erroneous. I further request that this Court consider granting the relief requested in Applicant's Motion and/or hold a hearing on the matter. If the Court is inclined to hold a hearing, I will be out of the State the majority of the week of April 25th and May 2nd.

Thank you for your time and consideration in this matter.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Clay Mitchell, Assistant Attorney General
Orangeburg County Clerk of Court
Willie Bell, Jr.
Jannie Simmons

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | e: blanchettelaw@gmail.com

LAW OFFICE OF TRICIA A. BLANCHETTE

August 30, 2016

Honorable Maité Murphy
Judge, 1st Judicial Circuit
5200 E. Jim Bilton Blvd.
St. George, SC 29477

RE: Willie Bell, Jr., v. State; Docket No.: 2009-CP-38-1261

Dear Judge Murphy:

I am contacting your Honor regarding the outstanding Rule 59(e), SCRCP, Motion in the above referenced case. I have enclosed a copy for your reference. In April, I wrote the enclosed letter following the State's submission of a response and proposed Order erroneously stating that the Rule 59 Motion had not been timely filed. As my emails at that time and letter addressed, the Clerk's Office failed to enter the Motion into the online system, a matter that has now been corrected.

I am contacting you to respectfully request a hearing and/or ruling on the Motion. Please let me know what I can provide to facilitate a resolution of this Motion for my client.

Thank you for your time and consideration in this matter.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Ruston Neely, Assistant Attorney General
Orangeburg County Clerk of Court
Willie Bell, Jr.

PO Box 12725 | Columbia SC 29211
p: 803.988.0008 | **e:** blanchettelaw@gmail.com

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Willie Bell, Jr., #254817, Applicant, v. State of South Carolina, Respondent.	2009-CP-38-1261 **RETURN TO APPLICANT'S MOTION PURSUANT TO RULE 59(A) AND (E), SCRCP**

This matter comes before the Court by way of Applicant's "Motion Pursuant to Rule 59(a) and (e), SCRCP." Respondent, making its Return to the motion, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the April 2006 term of the Orangeburg County Grand Jury for Murder (2006-GS-38-0751). He was represented by Peggy Hinds, Esquire, and Doug Mellard, Esquire. Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr. Applicant was found guilty, and on March 15, 2007, Applicant was sentenced to fifty (50) years' imprisonment.

A notice of appeal was filed and an appeal perfected by Robert M. Dudek, then Deputy Chief Appellate Defender for Capital Appeals of the South Carolina Commission on Indigent Defense of the Division of Appellate Defense. Applicant's conviction and sentence were affirmed. State v. Bell, Op. No. 2009-UP-325 (S.C. Ct. App. filed June 15, 2009). The remittitur was sent on July 1, 2009.

Applicant filed an application for post-conviction relief on April 15, 2013 and amended on July 29, 2009. A full evidentiary hearing into the matter was convened May 20, 2015, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by counsel, Tricia A. Blanchette, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell of the South Carolina Attorney General's Office. By written Order signed August 31, 2015, and filed September 15, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice. Applicant made a Rule 59(e) motion that was clocked by the clerk's office on September 23, 2015, but was not filed or listed online. Respondent filed a response asking that the 59(e) motion be dismissed based on lack of timely filing. Counsel for Applicant, in concert with the clerk's office, recovered the missing 59(e) motion, which was timely filed. The following is the State's response to that motion.

II.

Respondent submits this Court properly ruled on all issues presented at the post-conviction relief hearing and Applicant's motion should be denied. In his motion, Applicant asserts that several of his allegations are not addressed sufficiently and asks this Court to reconsider its ruling. Respondent submits that this Court's Order of Dismissal contains the required findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976) and Rule 52(a) SCRCP. See also McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits Applicant's arguments are better made on appeal and the Court should dismiss Applicant's motion.

III.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

RUSTON W. NEELY
Assistant Attorney General
SC Bar #100192

By: _____
ATTORNEYS FOR RESPONDENT

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Telephone: (803) 734-5844

Feb. 8, 2017

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Willie Bell, Jr., #254817, Applicant, v. State of South Carolina, Respondent.	2009-CP-38-1261 **ORDER DENYING MOTION TO ALTER OR AMEND THE ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed July 29, 2009. An evidentiary hearing into the matter was convened May 20, 2015, at the Dorchester County Courthouse. Applicant was present at the hearing and was represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell of the South Carolina Attorney General's Office. By written Order signed August 31, 2015, and filed September 15, 2015, this Court denied and dismissed Applicant's post-conviction relief action with prejudice.

Applicant made a motion pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, in which he asks this Court to alter or amend its order dismissing his PCR application. Respondent made its return to the motion, requesting this motion be dismissed.

Based upon careful reconsideration of the evidence in this case, including Applicant's motion and supporting memorandum, this Court is not persuaded to alter or amend its judgment. This Court further finds oral argument would not aid in the reconsideration of the original judgment. The Order of Dismissal issued by this Court contains the required findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code and Rule 52(a) of the South Carolina Rules of Civil Procedure.

IT IS THEREFORE ORDERED that Applicant's motion be denied and dismissed.

AND IT IS SO ORDERED this 20 day of April, 2017.

Maite' Murphy

THE HONORABLE ~~DIANNE GOODSTEIN~~ Maite' Murphy
~~Chief Administrative~~ Judge

St. George, South Carolina